

83 - 480

Office-Supreme Court, U.S.
FILED

SEP 21 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

PAUL E. DUCOMMUN and
SHIRLEY D. DUCOMMUN, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

As reported in:

PAUL E. DUCOMMUN and
SHIRLEY D. DUCOMMUN, et al.,
Petitioners-Appellants,
Nos. 81-2228, 81-2229,
81-2230, 81-2231

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PAUL E. DUCOMMUN
and
SHIRLEY D. DUCOMMUN,
et al.,
Petitioners/Pro Se
Box 461
Monument, Colorado
80132
(303) 332-9121

QUESTIONS PRESENTED FOR REVIEW

Is not review warranted when Respondent denies in their Notice of Deficiency the existence of the very entity used as the foundation of the Court's decision on the law.

Is not review warranted when outstanding motions to shift the burden of proof and for summary judgment have never been ruled on.

Is not review warranted when an officer of the Court fails to follow court rules and procedures.

PARTIES TO THIS PROCEEDING

The caption of this case, as presented, does not contain the following names: Richard L. Ducommun, Dennis L. Ducommun, Jeanne P. Ducommun, Frances B. Ducommun (dec'd) - Dennis L. Ducommun, personal representative.

TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented for Review.....	i
Parties to this Proceeding.....	i
Citations to Opinions Below.....	2
Jurisdiction.....	2
Statement of the Case.....	3
Reasons for Granting the Writ.....	3
Conclusion.....	12

Appendix A:

Opinion of the Tenth Circuit... A-1

TABLE OF CITATIONS

	<u>PAGE</u>
26 U.S.C. 162.....	8
26 U.S.C. 701.....	7
26 U.S.C. 702, 702(a), 702(c).....	5,6
26 U.S.C. 704(a).....	6
Tax Court Rule 34(b)(4).....	9
Dowell v. Commissioner, 614 P.2d 1263, 1265(1980).....	9
Durkee v. Commissioner, 162 F.2d 184, 187, 173, A.L.R.553.....	11
Helvering v. Taylor, supra, 293 U. S. at 515-516. 55 S.Ct. at 290-291..	11
MacCrowes Estate v. Commissioner, supra, 252 F.2d at 294.....	10
O'Donnell v. Belcher, 414 F.2d 833, 842(CA5, 1969).....	4
Podell v. Commissioner, 55 T.C. 429 (Dec. 30, 1970).....	7
Pratt v. Commissioner of Internal Revenue, 550 F.2d 1023, 1026 (CA5, 1977).....	6
Thomas v. Commissioner, supra, 223 F.2d at 88.....	11
United States v. Basye, 73-1 U.S. T.C. 9250, 410 U.S. 441, 448 (1973).....	7

9 Mertens Law of Federal Income Taxation (Zimet Revision) 50-61, pp. 118-119.....	11
---	----

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

PAUL E. DUCOMMUN and
SHIRLEY D. DUCOMMUN, et al.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

As reported in:

PAUL E. DUCOMMUN and
SHIRLEY D. DUCOMMUN, et al.,

Petitioners-Appellants,

v.

Nos. 81-2228, 81-2229
81-2230, 81-2231

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered on June 24, 1983.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals Tenth Circuit is Slip Opinion, and is set out in Appendix A infra at P. A1.

JURISDICTION

The judgment of the Tenth Circuit was entered on June 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 and 26 U.S.C.A. 7482.

STATEMENT OF THE CASE

The Petitioners here were statutorily mandated plaintiffs, originally in the United States Tax Court. An appeal to the United States Court of Appeals for the Tenth Circuit resulted in one opinion, see *infra* Appendix A. The United States Tax Court issued no opinion in either case.

REASONS FOR GRANTING THE WRIT

The Commissioner of Internal Revenue denies in each case of the notices of deficiency issued the existence of the partnership known as the Beneficiaries of Leslie Ducommun Estate Partnership, and denied existence of filed partnership returns for the years 1976, 1975 and 1974. The appeals officer of the Internal Revenue Service also continuously denied the existence

of the partnership. In conference, said appeals officer stated to petitioners that proof of filing of partnership returns would negate respondent's case, as the statute of limitations would have expired on this audit. Subsequent to furnished proof that partnership returns had indeed been filed, demand was made to audit these records.

Subpoena of partnership records was issued May 28, 1981, for delivery in Tax Court June 1, 1981, against a partner never having any contact with said records. The examining agent stated that the partnership return had been audited by the Omaha office of the Service, and no change had been made, and that this file was misfiled between the Omaha office and the Denver office.

In O'Donnell v. Belcher, 414 F.2nd 833, 842(CA5, 1969) the Fifth

Circuit Court of Appeals held "A notice of deficiency is to follow, rather than precede, the final determination". In the instant case the Service issued the notice of deficiency prior to making any genuine final determination in order to circumvent the statute of limitations.

The general rule for income and credits of partner as defined in 26 U.S.C.A. 702(a) states, "In determining his income tax, each partner shall take into account separately his distributive share of the partnership's (1) gains and losses from sales or exchanges of capital assets held for not more than 1 year, (2) gains and losses from sales or exchanges of capital assets held for more than 1 year, (3) gains and losses from sales or exchanges of property described in section 1231, (7) other items of income, gain, loss, deduction,

or credit, to the extent provided by regulations prescribed by the Secretary, and (8) taxable income or loss, exclusive of items requiring separate computation under other paragraphs of this subsection." In addition, under 26 U.S.C. 702(c) gross income of a partner, "in any case where it is necessary to determine the gross income of a partner for purposes of this title, such amount shall include his distributive share of the gross income of the partnership". Under 26 U.S.C. 704(a) "a partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this chapter, be determined by the partnership agreement".

In Pratt v. Commissioner of Internal Revenue, 550 F.2d 1023, 1026(CA5, 1977) the Court of Appeals for

the Fifth Circuit held: "By (Congress) adopting the provisions of Subchapter K...the law now gives a partnership an entity distinct from that of the individual partners...". In Podell v. Commissioner, (Dec. 30, 456), 55 T.C. 429 (1970) the Tax Court held that the reference to the trade or business of the "taxpayer" in Section 1221(1) "clearly refers to the trade or business of the partnership, despite the fact that under Section 701 partnerships are not subject to income tax".

Moreover, the opinion of the Supreme Court in United States v. Basye 73-1 U.S.T.C. 9250, 410 U.S. 441 (1973), as indicated by the following excerpt (410 U.S. 448): 'Thus, while the partnership itself pays no taxes, 26 U.S.C. 701, it must report the income it generates and such income must be

calculated in largely the same manner as an individual computes his personal income. For this purpose, then, the partnership is regarded as an independently recognizable entity apart from the aggregate of its partners...'. "Accordingly, we hold that in the context of Section 162 the character of the deductions, i.e. whether they were incurred in the course of a trade or business, must be resolved at the partnership level".

Petitioners protested respondent's continual denial of existence of partnership returns in both the filed petitions for redetermination and the response to respondent's answer, and also stated in both the fact that audit of the partnership return by the Omaha office of the Service produced no changes or reports. All issues on

errors of deficiency assessments were raised in the petitions under Tax Court Rule 34(b)(4). The issue of the running of the statute of limitation was again raised in the motion to quash the subpoena of partnership records, and in the motion to shift the burden of proof, which motion was never ruled on by the lower court.

Petitioners' motion for summary judgment and to shift the burden of proof were timely filed, but were not recorded by the clerk of the lower court. A motion to consolidate was never acted upon, and was not recorded by the clerk of the lower court.

The Tenth Circuit Court of Appeals decided in Dowell v. Commissioner, 614 P.2d 1263 (1980) 'The general statute of limitations, 26 U.S.C. 6501(a), provides 'any tax

imposed by this title shall be assessed within three years after the return was filed'. 'Thus once the taxpayer has evinced an honest and genuine effort to satisfy the law by filing such a return, the 6501(a) period begins to run'. 614 F.2d at 1265.

Respondent attempted to change the original deficiency assessments by demanding records of the partnership which they had been insisting did not exist. The presumption as to the correctness of the Commissioner's determination is then out of the case. MacCrowe's Estate v. Commissioner, supra, 252 F.2d at page 294. 'The Commissioner and not the taxpayer then has the burden of proving whether any deficiency exists and if so the amount. It is not incumbent upon the taxpayer under these circumstances to prove that

he owed no tax or the amount of the tax which he did owe'. Helvering v. Taylor, supra, 293 U.S. at pages 515-516, 55 S.Ct. at pages 290-291; Thomas v. Commissioner, supra, 223 F.2d at page 88; Durkee v. Commissioner, 6 Cir., 162 F.2d 184, 187, 173 A.L.R. 553; 9 Mertens, Law of Federal Income Taxation, (Zimet Revision) 50-61, pp. 118-119.

Petitioners were not aware of the deadline for a status report. Every effort was being made to locate the subpoenaed records which none of the living petitioners had handled. The partner who had handled the records passed away June 16, 1977, making tracing their whereabouts difficult. The petitioners did not learn of the lack of follow-up by counsel until late August, and immediately secured new counsel in attempt to reinstate, which

motion was summarily dismissed. The lower courts have punished petitioners for failure of officers of the courts to follow court rules and procedures.

CONCLUSION

The motion to dismiss should not have been granted. Tax Court erred in not protecting the constitutional rights of due process by enforcing the statute of limitation bar against the Commissioner.

The naked thrust of the subpoena duces tecum is solely to circumvent the statute of limitations bar to audit of the partnership tax return.

For the reason set forth herein the petitioners respectfully pray that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted

PAUL E. DUCOMMUN
Petitioner/Pro-Se
Box 461
Monument, Colorado 80132

(303) 332-9121

SHIRLEY D. DUCOMMUN
Petitioner/Pro-Se
Box 461
Monument, Colorado 80132

(303) 332-9121

6-24-83

81-2228

81-2229

81-2230

81-2231

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

Slip Opinion

APPENDIX A

FILED
United States Court
of Appeals Tenth
Circuit
June 24, 1983
HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PAUL E. DUCOMMUN and)	
SHIRLEY D. DUCOMMUN, et al.))	
)	Nos. 81-2228
Petitioner-Appellants,)	81-2229
)	81-2230
v.)	81-2231
)	
COMMISSIONER OF INTERNAL)	
REVENUE,)	
)	
Respondent - Appellee.))	

Appeal from the United States
Tax Court

Gloria T. Svanas, Odessa Texas for
Appellants.

Kenneth L. Green (Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Richard Farber and Jo-Ann Horn, Attorneys, Tax Division, Department of Justice, Washington, D.C., on the brief) for Appellee.

Before DOYLE, MCKAY AND BREITENSTEIN,
Circuit Judges.

BREITENSTEIN, Circuit Judge.

These four appeals attack the dismissal by the Tax Court of four related actions for failure to prosecute. Four groups of taxpayers sued for redetermination of income tax deficiencies assessed by the Commissioner of Internal Revenue, CIR, for the tax year 1976. The disputes arose from the operations of a partnership in which all of the taxpayers were interested. We affirm.

The partnership filed a timely information return for 1976. The

deficiency assessment was based on the treatment of partnership capital gains and losses in the timely filed individual returns. The pro se petitions of the taxpayers, filed on July 14, 1980, were couched in conclusory language and asserted that the deficiency assessments were arbitrary, capricious, and without factual support. To support their claims, the taxpayers referred to a schedule attached to the partnership return.

In February, 1981, the Tax Court notified the petitioners that trial was set for June 1, 1981, in Denver, that the parties should stipulate to undisputed facts and documents, and that the parties should confer promptly to meet this requirement. See Rule 91, Tax Court Rules of Practice and Procedure. On May 28, 1981, a subpoena duces tecum

was served on petitioner Paul Ducommun directing him to produce enumerated documents at the June 1 trial. On that date he appeared with counsel and presented a written motion to quash or modify the subpoena. The motion alleged that "the entity involved [presumably the partnership] has not been timely examined by the Internal Revenue Service within the statutory period allowed for assesment of tax." The taxpayer did not challenge statements by counsel for CIR that the government's requests for information had failed. The documents required by the subpoena were not produced. The Tax Court continued the matter until June 4. Counsel for the taxpayers said that he would be "available" at that time. R. vol. II, p. 11.

On June 4 none of the taxpayers,

nor their counsel. appeared. The court denied the motion to quash or modify the subpoena and further:

"ORDERED that the parties are to file with the Court on or before July 24, 1981, a status report, stating whether or not a basis of settlement has been reached or if a meaningful stipulation of facts has been prepared for the trial of this case. If a settlement has not been reached or a meaningful stipulation of facts has not been prepared by said date, counsel for respondent may file a motion to dismiss for lack of prosecution in these cases."

On July 27, CIR filed a motion to dismiss stating non-compliance with the subpoena and no effort by the taxpayers to settle or enter into a meaningful stipulation of the facts. On July 30, the Tax Court dismissed the four actions. On September 1 new counsel filed an entry of appearance and moved to set aside the order of dismissal. This motion was denied on September 9,

1981, and these appeals followed.

To support their claim that the dismissal was arbitrary and capricious, taxpayers argue that the deficiency assessment was barred by the three-year statute of limitations provided in 26 U.S.C. Section 6501(a) and (b). The argument has no merit. The bar of the statute was not raised in any of the petitions attacking the deficiency assessment. Tax Court Rule 34(b)(4) requires that the petition for relief clearly state all alleged errors in the deficiency assessment and that "...any issue not raised in the assignment of errors shall be deemed to be conceded. . . ." The failure to raise the bar in the petitions is not cured by its assertion in Paul Ducommun's motion to quash the subpoena.

Section 701, 26 U.S.C., provides

that partners are individually liable for taxes on income from the partnership. The notice of deficiency was timely under Section 6501 and it suspends the running of the statute of limitations on assessment and collection. The partnership information return required by Section 701, affords no basis for any claim of a statutory bar.

Tax Court Rule 123(b) authorizes dismissal of a case for failure to prosecute properly, or to comply with the Rules or Orders of the court, or for other cause which the court deems sufficient. As discussed in *Freedson v. Commissioner of Internal Revenue*, 5 Cir., 565 F.2d 954, 955, the Advisory Committee Note to Rule 123(b) suggests that courts should look to Rule 41, F.R.Civ.P., for guidance in determining

standards for dismissal. In that context, it is well established that every court has the inherent power, in the exercise of its discretion, to dismiss a case for want of prosecution and that an appellate court will not reverse such a dismissal in the absence of abuse of discretion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-633; and *Petty v. Manpower, Inc.*, 10 Cir., 591 F.2d 615, 617. The Tax Court did not abuse its discretion in dismissing the actions.

Taxpayers other than Paul Ducommun contend that they were deprived of due process because the Tax Court acted in part on the failure of Paul Ducommun to respond to the subpoena. That failure was but one incident. None of the petitioners-taxpayers complied with the Rules and Orders of the court. They had

a neutral forum for presentation of their claims with full opportunity to be heard. Their defiance of the Rules and Orders justified the dismissal of their actions. *Miller v. Commissioner of Internal Revenue*, 8 Cir., 654 F.2d 519. 521.

In Nos. 81-2228, 81-2229, 81-2230, and 82-2231 the judgments are severally affirmed.